



DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XB958]

Process for Distinguishing Serious from Non-Serious Injury of Marine Mammals;

Proposed Revisions to Procedural Directive (NMFS PD 02-038-01)

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; request for comments.

SUMMARY: The National Marine Fisheries Service (NMFS) solicits public comments on draft revisions to the Process for Injury Determination, Distinguishing Serious from Non-Serious Injury of Marine Mammals (NMFS Procedural Directive (PD) 02-038-01).

DATES: Comments must be received by *[insert date 30 days after date of publication in the FEDERAL REGISTER]*

ADDRESSES: The draft revisions to the Process for Injury Determination Distinguishing Serious from Non-Serious Injury of Marine Mammals (NMFS PD 02-038-01) are available at: <https://www.regulations.gov/docket/NOAA-NMFS-2022-0043>. You may submit comments on the proposed revisions, through the Federal e-Rulemaking Portal:

1. Go to <https://www.regulations.gov> and enter NOAA-NMFS-2022-0043 in the Search box.
2. Click the “Comment” icon, and complete the required fields.
3. Enter or attach your comments.

Instructions: NMFS may not consider comments if they are sent by any other method, to any other address or individual, or received after the end of the comment period. Due to delays in processing mail related to COVID-19 and health and safety

concerns, no mail, courier, or hand deliveries will be accepted. All comments received are a part of the public record and will generally be posted for public viewing on <https://www.regulations.gov> without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the commenter may be publicly accessible. NMFS will also accept anonymous comments (enter “N/A” in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Jaclyn Taylor, NMFS Office of Protected Resources, (301) 427-8402, Jaclyn.Taylor@noaa.gov; or Phinn Onens, NMFS Office of Protected Resources, (301) 427-8402, Phinn.Onens@noaa.gov.

SUPPLEMENTARY INFORMATION:

The Marine Mammal Protection Act (MMPA) (16 U.S.C. 1361 *et seq.*) requires NMFS to estimate the annual levels of human-caused mortality and serious injury (M/SI) to marine mammal stocks (Section 117) and to classify commercial fisheries based on their level of incidental M/SI of marine mammals (Section 118). This charge requires that NMFS distinguish between injuries that are serious and those that are not serious. However, the MMPA and its legislative history do not provide guidance on how severe an injury must be to qualify as “serious.” NMFS defined “Serious Injury” in regulations (50 CFR 229.2) as “any injury that will likely to lead to mortality.” While this definition provided guidance on which injuries should be considered serious injuries, it allowed subjective interpretation of the likelihood that an injury would result in mortality.

To promote national consistency for interpreting the regulatory definition of serious injury, NMFS convened a workshop in April 1997 to discuss available information related to the impact of injuries to marine mammals incidental to commercial operations (Angliss and DeMaster, 1998). The outcomes of the 1997 Workshop,

including the development of regional techniques for assessing and quantifying the serious injury of marine mammals, helped NMFS to accomplish the MMPA's mandates. However, through implementing workshop guidance, NMFS recognized a need for a nationally consistent and transparent process for effective conservation of marine mammal stocks and management of human activities implementing these stocks. Further, since 1997, additional information had been collected on human-caused injuries to marine mammals and survival rates of certain individuals and/or species of marine mammals.

Accordingly, NMFS convened a second workshop in September 2007 (Serious Injury Technical Workshop) to review performance under existing guidance, gather scientific information, and update guidance based on the best scientific information available (Andersen *et al.* 2008). Based on the results of the 2007 workshop and input from marine mammal scientists, veterinary experts, and the MMPA Scientific Review Groups, NMFS developed national guidance and criteria in 2012, comprising a Policy Directive (02-038) and associated Procedural Directive (02-038-01), for distinguishing serious from non-serious injuries of marine mammals (Both directives are available at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-protection-act-policies-guidance-and-regulations>). The Policy Directive provides further guidance on NMFS' definition of "serious injury," and the Procedural Directive describes the annual process for making and documenting injury determinations. The annual process includes guidance for which NMFS personnel make the annual injury determinations; what information should be used in making injury determinations; information exchange between NMFS Science Centers; NMFS Regional Office and Scientific Review Group review of the injury determinations; injury determination report preparation and clearance, and inclusion of injury determinations in the marine mammal stock assessment reports and marine mammal conservation management regimes (*e.g.*,

MMPA List of Fisheries, Take Reduction Teams, Take Reduction Plans, vessel speed regulations).

The injury criteria set forth in the Procedural Directive were developed separately for large whales, small cetaceans, and pinnipeds because of the differences in the source and nature of injury data for these groups. In addition, the types and impacts of injuries differ between these broad taxonomic groups. The injury determinations for large whales are largely based on an analysis of NMFS data on injury events with known outcomes (*i.e.*, survival or death of the animal), with the exception of a few criteria based on expert opinion (Andersen *et al.* 2008). In contrast, the injury criteria and determination for small cetaceans and pinnipeds are based almost entirely on expert opinion because data on documented injuries and known outcomes in the wild are not available for most small cetaceans and pinnipeds.

NMFS solicited public comment on both the policy and procedural directive (76 FR 42216; July 18, 2011) and the directives were finalized in 2012. The NMFS Policy Directive specifies that NMFS should review both the Policy and Procedural Directives at least once every five years, or when new information becomes available, to determine whether any revisions to the Directives are warranted. The review must be based on the best scientific information available, input from the MMPA Scientific Review Groups, as appropriate, and experience gained in implementing the process and criteria. If significant revisions are indicated during the review, NMFS will consider making these available for public review and comment prior to acceptance.

In 2017, NMFS initiated a review of the Policy and Procedural Directives and invited subject matter experts from within NMFS to identify necessary revisions based upon the best scientific information available. The review suggested that, in general, the national guidance is meeting its objectives of providing a consistent, transparent, and systematic process for assessing serious from non-serious injuries of marine mammals.

However, there was enough substantive feedback to warrant revising the Procedural Directive.

Through the review process, several topics were identified by an internal NMFS Working Group to help concentrate the proposed revisions to the Procedural Directive. Revisions primarily focused on the pinniped and small cetacean sections (Section VIII and IX respectively) and included the creation of a new case specific harassment category (P16) for pinnipeds and expanding existing subcategories (S15a and S15b for small cetaceans) using the best scientific information available. NMFS has also clarified criteria associated with some small cetacean injury categories, including those involving lip and mouth hookings. To inform these proposed revisions, NMFS conducted literature reviews, sought input from several researchers with long-term longitudinal data sets, and solicited individual expert opinion from experts familiar with small cetacean injuries (including anatomists and veterinarians). Further, NMFS included potential risk factors that may lead to the development of capture myopathy in certain individuals, and a list of observable external physical signs that may lead to capture myopathy. This information on capture myopathy is included as an appendix to the Procedural Directive. In addition to the taxa specific revisions, some minor edits were made to improve readability and clarity and to clarify the determination process and reporting procedures. The proposed revised Procedural Directive is available at: <https://www.regulations.gov/docket/NOAA-NMFS-2022-0043>. NMFS solicits public comments on the proposed revisions.

REFERENCES:

- Andersen, M. S., K. A. Forney, T. V. N. Cole, T. Eagle, R. Angliss, K. Long, L. Barre, L. Van Atta, D. Borggaard, T. Rowles, B. Norberg, J. Whaley, and L. Engleby. 2008. Differentiating Serious and Non-Serious Injury of Marine Mammals: Report of the Serious Injury Technical Workshop, 10–13 September 2007, Seattle, Washington.
- U.S. Dep. Commer., NOAA Tech. Memo. NMFS–OPR–39. 94 p.

Angliss, R.P. and D.P. DeMaster. 1998. Differentiating Serious and Non-Serious Injury of Marine Mammals Taken Incidental to Commercial Fishing Operations. NOAA Tech Memo. NMFS–OPR–13, 48 p.

Catherine Marzin,
Deputy Director, Office of Protected Resources,
National Marine Fisheries Service.
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